United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4141

United States Court of Appeals

FOR THE SECOND CIRCUIT

ITT CONTINENTAL BAKING COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

TED BATES & COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

On Petitions for Review of Orders of the Federal Trade Commission

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REPLY BRIEF OF TED BATES & COMPANY, INC.

MARSHALL COX
DONALD J. MULVIHILL
LAURENCE T. SORKIN

CAHILL GORDON & REINDEL
1819 H Street, N.W.
Washington, D.C. 20006
(202) 659-3030

Attorneys for Petitioner
Ted Bates & Company, Inc.

Of Counsel:

ELHANAN C. STONE
Ted Bates & Company, Inc.
1515 Broadway
New York, New York 10036

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REPLY BRIEF OF TED BATES & COMPANY, INC.

This reply to the brief of respondent Federal Trade Commission (the "Commission") is submitted on behalf of petitioner Ted Bates & Company, Inc. ("Bates").[1]

[1] In the interest of brevity and to avoid unnecessary duplication, Bates in its main brief adopted the Statement of the Case and

The Commission's brief is largely unresponsive to the specific arguments made by ITT Continental and Bates. Rhetoric and inapplicable legal generalizations are substituted for meaningful discussion of the issues posed. Whenever the brief characterizes Bates's conduct as "flagrant" (pp. 61, 69, 72, 73, 83) or "knowingly perpetrated" (p. 78) or "massive deception" (p. 73) or refers to "long-standing deception of the most susceptible members of our society" (p. 60, *see also* p. 67), it must be remembered that these are not the Commission's words, for the record contains no findings of this sort, but are the arguments of appellate counsel.

The Commission itself exonerated ITT Continental and Bates of every allegation tried out against them, finding a violation only by constructing a convoluted post-hearing charge.[2] In these circumstances, ritual invocation of *FTC* v. *National Lead Co.*, 352 U.S. 419, 510 (1957), or its "fencing in" language (*see, e.g.*, Comm. br., pp. 50, 51, 77, *see also* p. 75) would not justify the broad and murky order entered here, even were this Court to uphold the Commission's determination that Sections 5 and

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Argument set forth in the brief of petitioner ITT Continental Baking Company, Inc. ("ITT Continental"). For the same reasons it also adopts the reply brief being submitted by ITT Continental.

[2] As Bates pointed out in its main brief (p. 4 n.3), the Commission dismissed every claim relating to Hostess Snack Cakes (App. 220-22, Opinion pp. 22-24). As for the complaint's charges with respect to Wonder Bread, the Commission dismissed each of five distinct claims in paragraphs 8(a)-(e) (App. 212-14, Opinion, pp. 14-16), the misrepresentation allegation in paragraph 11 (App. 218, Opinion p. 20), and the unfairness allegations in paragraphs 10 and 11 (App. 220, Opinion p. 22). Only by ignoring the "exploitation" charge upon which the allegations in paragraph 10 were tried out before the Administrative Law Judge was the Commission able to find any violation at all, and that by a tortuous determination that the advertising in issue "implied" falsely that Wonder Bread is an "extraordinary food for producing dramatic growth in children."

12 of the Federal Trade Commission Act have been violated.

(i) There is no reasonable relationship between the Commission's order and the specific violation found (Reply to pp. 49-69)

There is no dispute among the parties about the standard that this Court is to apply in reviewing the Commission's order. That order cannot be affirmed unless there is a reasonable relationship between it and the unlawful practices found to exist. *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946); *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F.2d 785, 791 (D.C. Cir. 1965); *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 148-49 (2d Cir. 1964).

The only dispute in this Court is about the application of that standard to the facts here, for we agree entirely with the Commission that:

> "In each case the propriety of a broad order depends upon the 'specific circumstances of the case.' *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. [374], at 394 [(1965)]." (Comm. br., pp. 50-51)[3]

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[3] Because the propriety of an order must be considered against the specific facts of the case at hand, the great bulk of the cases cited by the Commission are of no assistance. This is not a fictitious pricing case (*Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1974); *Benrus Watch Co.* v. *FTC*, 353 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Giant Food, Inc.* v. *FTC*, 322 F.2d 977 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964); *Consumer Sales Corp.* v. *FTC*, 198 F.2d 404 (2d Cir. 1952)), or a case in which respondent held himself out as someone or something he was not (*Lane* v. *FTC*, 130 F.2d 48 (2d Cir. 1942)), or asserted that a product claim was substantiated by laboratory tests when it was not, *National Dynamics Corp.* v. *FTC*, 492 F.2d 1333 (2d Cir. 1974), or misrepresented the origin of its goods (*Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337 (7th Cir. 1960)) or the broadcast range of or licensing requirements for its product (*Western Radio Corp.* v.

(a) *The order is not designed to protect the class of persons supposedly deceived.*

The Commission argues before this Court that the *sole* violation upon which its order rests was a misrepresentation *to children* that Wonder Bread is an extraordinary food to produce growth: "[t]he Commission's opinion on reconsideration * * * makes clear that the Commission only considered the Paragraph 10 allegation as a deception of children * * *" (Comm. br., pp. 29-30). It does so despite the record evidence, recognized by the Commission's brief before the District of Columbia Circuit (p. 5) but not alluded to here, that children do not significantly influence the purchase of bread, a fact that led ITT Continental to cease all advertising directed to children more than a year before the complaint was filed (App. 386-87).[4]

The violation upon which the Commission's broad order directed at nutritional advertising of any food product depends thus concerns an alleged misperception by children, which did not influence the purchase of the

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FTC, 339 F.2d 937 (7th Cir. 1964)), or falsely disparaged its competitors' products (*Carter Products, Inc.* v. *FTC*, 323 F.2d 523 (5th Cir. 1963)).

As for this Court's decisions in *William H. Rorer, Inc.* v. *FTC*, 374 F.2d 622 (2d Cir. 1967), and *Federated Nationwide Wholesalers Service* v. *FTC*, 385 F.2d 253 (2d Cir. 1968), both required modification of Commission orders that were not reasonably related to the specific violations found. In *Rorer*, the Court warned that "[i]t is incumbent upon the Commission to shape all provisions of its orders realistically to the violation it has found; the cases cited above and the somewhat overbroad order reviewed here indicate it does not always do so" (374 F.2d at 627).

[4] The only record evidence indicates that children in the age bracket 2 to 12 influence the brand of bread purchased in less than one percent of households. This fact can be contrasted with breakfast cereal purchases where purchases influenced by children 2 to 12 occur in an impressive 88 percent of households. (App. 387)

dvertised product in any significant way, of advertising aimed chiefly at adults.[5]

The Commission does not face up to this anomaly. Instead it argues that since children make up a part of the general television audience, and are unsophisticated in viewing fantasy-type advertising, an order affecting all advertising, even that directed at adults, is necessary (Comm. br., pp. 49-54), ignoring the fact that no economic effect results from the misrepresentation found.[6] No attempt has been made here to fashion an order which is limited to protecting the class of persons—children—supposedly misled.

The Commission indeed argues that the violation "involved the deception of a large number of the least sophisticated members of society on a matter of great importance to them, nutrition, which they are not able to test for themselves" (p. 67). Although it is patent that "nutrition" is of importance to growing children, the proposition that nutritional advertising is of great importance to them is highly dubious, and the Commission

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[5] As ITT Continental points out in its reply brief (pp. 2-7), the Commission's present argument that the only violation found was deceiving children is an impermissible attempt to revive a moribund case by changing the asserted ground for decision at the appellate level. However, had the Commission below reached its determination solely on the ground it now says it did, it is highly doubtful that any violation could have been found. We are not aware of any Commission case holding that the mere fact that children may misinterpret commercials directed to adults is a violation of the act when the misinterpretation has no economic effect because children do not purchase or influence the purchase of the product advertised.

[6] Neither of the cases cited by the Commission urging special protection for children is apposite to the present case. In each instance the unlawful practice was directed specifically to children, either as purchasers or as persons significantly influencing purchases. *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934), involved sales in the penny candy trade to school children; *Ideal Toy Corp.*, 64 F.T.C. 297 (1964), involved false advertising of toy performance which was found to mislead both children and adults.

did not so find. Even in attempting to justify the broad order here in its opinion on reconsideration, the Commission found it necessary to refer to the "importance of correct nutritional advertising to children *and consumers* of correct nutritional information" (App. 276, emphasis supplied). It is not without significance that the Commission's brief, in paraphrasing that finding, found it unnecessary to include the italicized words (Comm. br., p. 54).

Bates's main brief referred at length to the importance of nutritional advertising (*see* pp. 28-30, 36-37). What the Commission's appellate counsel seem to be arguing before this Court is that such advertising, no matter its importance, cannot be employed if it may under any circumstances be misperceived by children, including those children ages 1 to 6 who may happen to view it. That contention is not only silly but has no basis in anything the Commission itself found.

(b) *The order is too broad for the narrow violation found.*

Nor is the order reasonably related to the narrow violation found, a purported misrepresentation that Wonder Bread would produce "extraordinary growth." Except for paragraph 2, the order is not directed at all to representations about growth but is instead a vehicle for regulating nutritional claims in all food advertising, whether directed to children or to the adult viewing audience.[7]

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[7] Although paragraph 2 at least deals with the general subject matter of the purported misrepresentation, much of its language is vague, ambiguous and overbroad, as Bates pointed out in its main brief (pp. 39-41). The Commission's chief response to its infirmities is to argue that neither ITT Continental nor Bates "challenged this order provision before the Commission and they are precluded from raising it for the first time on appeal" (p. 66). The basis for this mistaken claim is apparently that no challenge to paragraph 2 was included in the petitions for reconsideration filed by ITT Continental and Bates. It is the fact, however, that

The absence of any reasonable relationship between the order and the violation found was discussed at length in Bates's main brief (pp. 12-30) and ITT Continental's main brief (pp. 37-46), and the Commission does not meet that argument beyond restating the language in its Order Ruling on Petitions for Reconsideration (App. 272 *et seq.*).

The Commission does not deal at all with the fact that the provisions of paragraphs 1 and 3 of the order entered are much more directly related to the alleged violations of which Bates and ITT Continental were exonerated than to the sole violation found. Thus, the Commission continues to assert that "the gravamen of the complaint is the misrepresentation of the nutritional property of food" (Comm. br., p. 61), while it wholly ignores the fact that the complaint allegations that dealt with nutritional advertising—the five subparagraphs of paragraph 8 in the case of Wonder Bread (App. 21) and the four subparagraphs of paragraph 13 in the case of Hostess Snack Cakes (App. 25)—were each dismissed. (App. 214, 222; Opinion, pp. 16, 24). Why was it necessary to have an extended trial of charges that were dismissed if the same order was to be entered in any event?

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paragraph 2 grants in substance the same relief originally sought by complaint counsel in the proposed order they filed with the Commission as part of their appeal from the Administrative Law Judge's decision. That proposed order would have barred ITT Continental and Bates from advertising that "(h) any [food] product will contribute to the rapid and healthy growth of children by providing dramatic or substantial benefits toward such growth or development" (App. 31-32). Bates timely objected to that provision as proposed by complaint counsel (Answering Brief of Respondent Ted Bates & Company, Inc., March 20, 1973, pp. 27-28), and the Commission's own rules provide that any petition for reconsideration "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission" (Rule 3.55 of the Commission's Rules of Practice, 16 C.F.R. § 3.55).

Characterizing the violation found here as "flagrant" (Comm. br., p. 61) is not enough to distinguish *National Dairy Products Corp.* v. *FTC*, 412 F.2d 605 (7th Cir. 1969), a case that specifically held that the Commission may not enter a broad order enjoining that which a respondent was found at trial not to have done.

Subparagraph 1.a. of the order prohibits Bates from making nutritional claims in "generalized terms," subparagraph 1.b. bars comparative nutritional claims that do not state the brand or product category to which the comparison is made, and subparagraph 1.c. bars claims that a food is an essential source of a particular nutritional value "if there are other food product categories which are the source of the same or similar nutritional properties." As Bates pointed out in its main brief (pp. 21-25), this collection of prohibitions reads as if the Commission had not found that claims of nutritional superiority were not made for Wonder Bread (App. 213, p. 15), and had not dismissed paragraph 8(a) of the complaint which alleged, in essence, that Wonder Bread's advertising represented it to be distinct from other enriched bread, nutritionally superior or "unique" (App. 214, Opinion, p. 16). The Commission also dismissed paragraphs 8(b) and 8(c) which alleged that the challenged advertising represented that Wonder Bread would supply "all the nutrients" "in recommended quantities" that are "essential to healthy growth and development" (*ibid.*). Yet paragraph 1 of the order reads as if such claims had been made and found by the Commission to be false.

As for paragraph 3 which broadly forbids the misrepresentation "in any manner" of any nutritional quality of any food product, in *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 149 (2d Cir. 1964), this Court made it plain that such Commission orders going "be-

yond the particular illegal practices found to exist" will not be affirmed. The result would otherwise be what the Court prohibited in *American Home Products Corp.* v. *FTC*, 402 F.2d 232, 237 (6th Cir. 1968), a transfer from the Commission to the district court of the task of enforcing Section 5 of the Federal Trade Commission Act.[8]

(ii) The Commission's order is vague and ambiguous (Reply to pp. 75-79)

In response to Bates's argument that certain provisions of the order are vague, ambiguous and meaningless, the Commission argues that Bates need not worry about the vagueness of the order since it can always go to the Commission if it has any questions of interpretation (pp. 75-76). But this is an illusory right in these circumstances. As the court held in *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F.2d 785, 791 (D.C. Cir. 1965), a respondent ought not be required to "expose his major business decisions to a Commission veto" by entry of a broad order likely to create "honest disagreements as to its scope and meaning * * *."

Subparagraph 1.b. The ambiguity in this subparagraph lies in the fact that the Commission and its staff appear

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[8] The Commission brief charges that Bates failed to challenge paragraph 3 as not reasonably related to the violation either before the Commission or in the prior brief filed before the District of Columbia Circuit (p. 67). In the first place, if ITT Continental properly presented such a challenge to that paragraph, and there is no contention that it did not, that is all that is required for Bates to raise it here. *Hennesey* v. *SEC*, 285 F.2d 411 (3d Cir. 1961); *see also Wilson & Co., Inc.* v. *United States*, 335 F.2d 788, 794 (7th Cir. 1964). In the second place, Bates did not simply rely upon the fact that ITT Continental had preserved that issue for appeal for Bates expressly "adopt[ed] and incorporate[ed] by reference" ITT Continental's petition for reconsideration (App. 249) and each of the briefs filed by ITT Continental before the District of Columbia Circuit (Brief for Petitioner Ted Bates & Company, Inc., D.C. Cir. Nos. 74-1173, 74-1199, pp. 2-3; Reply Brief of Petitioner Ted Bates & Company, Inc., *id.*, p. 1 n.1).

to view any nutritional claim at all as a comparative claim. To take Bates's example—advertising a product as a "useful source of protein"—the Commission's brief asserts this to be a comparative claim which can be made under subparagraph 1.b. only so long as "the product * * * being compared" is indicated (p. 76). We respectfully submit that the interpretation advanced on behalf of the Commission is bizarre and that there is no basis in the record for an order having this effect. That Commission counsel would assert that such advertising makes a "comparative claim" shows how difficult Bates's compliance problems under this provision would be and how great a restraint this provision would place upon Bates's ability to advertise any nutritional claim.

The same reasoning that bars a "useful source of protein" claim would also lead the Commission to bar a true claim that a food product is "high in Vitamin C" unless a "product being compared" is indicated. Yet as Bates pointed out in its main brief (pp. 21-23), the Commission in *Coca-Cola Co.*, 3 CCH Trade Reg. Rep. ¶ 20,470 (FTC 1973), found that very claim to be both lawful and not a comparative claim at all. The advertising in that case was not required to indicate "the product being compared." If the "high in Vitamin C" claim involved no "half-truth" (*contrast*, Comm. br., p. 77), there is no rational reason why Bates should be barred from making the same kind of claim, for the Commission has no power to bar truthful advertising. *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 24 (7th Cir. 1971); *Cotherman* v. *FTC*, 417 F.2d 587, 596 (5th Cir. 1969).[9]

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[9] A "high in Vitamin C" claim might also be deemed to run afoul of the provision in subparagraph 1.a. of the order barring the advertising of "nutritional properties of any [food] product" in "generalized terms." Once again, the effect would be to bar Bates from employing nutritional advertising that others can lawfully use.

Subparagraph 1.d. Although the Commission calls Bates's objection to this subparagraph "specious" (p. 70), the single paragraph devoted to the objection serves to confirm how ambiguous subparagraph 1.d. is. The statement that the subparagraph has been included "because of the growth sequence" simply does not "clarif[y] any ambiguities" (Comm. br., p. 77).

For example, complaint counsel argued before the Commission that subparagraph 1.d. applies to other attributes than nutrition and specifically to "freshness" claims made on behalf of a food product (App. 267), appellate counsel before the District of Columbia Circuit contended that "[o]f course none of the provisions of the order have anything to do with any representations that Bates may wish to make about freshness or taste, since these are not nutritional claims" (Brief for Respondent, p. 66, n.42), and here appellate counsel take no position at all as to the reach of the subparagraph.

Bates finds the subparagraph meaningless because it does not know what that subparagraph means. Appellate counsel says it bars use of a "growth sequence" but that is not enough. What else does it prohibit by such obscure phrases as "other visual techniques" and "actual depictions of the actual value of the product by actual persons"? The language is not self-explanatory, the Commission has not explained it, and its lawyers are in hopeless conflict as to its meaning.

As Bates pointed out in its main brief, subparagraph 1.d. is virtually a paraphrase of the provision of the Commission's order expressly rejected by the First Circuit and disapproved by the Supreme Court as "potentially limitless" in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 380 (1965) (*"Rapid Shave"*). The statement that subparagraph 1.d. is "virtually the same" as that approved by the Supreme Court in *Rapid Shave* (Comm.

br., p. 66) simply will not survive comparisons of the order here with the disapproved order in *Rapid Shave* and the order ultimately entered there. (*See* Bates's main brief, pp. 37-38 & 38 n.12).

Paragraph 2. The ambiguity in this paragraph results from the paragraph's being broader than the record that supports it. Obviously no food "by itself" will assure proper growth, but that truism does not mean that any claim that a given food will make a significant contribution to proper growth is false. Certainly there is no finding in this case that there is no such food, or that proper nutrition and growth are unrelated. The only violation found was a purported misrepresentation to children that Wonder Bread was "an extraordinary food for producing dramatic growth." If any order is to be entered, paragraph 2 must be modified to delete the references to "proper growth" and the phrase "by itself."

(iii) The Commission improperly considered prior consent orders in issuing its order (Reply to pp. 69-74)

Apparently recognizing that the narrow violation found, even if upheld by this Court, would not itself be enough to support an order covering all food advertising prepared by Bates, the Commission cited five prior consent orders entered against Bates in purported justification of the breadth of the order here (App. 227-28, Opinion, pp. 29-30).

However, as Bates's main brief demonstrated (pp. 30-34), prior consent decrees are not a proper matter to be considered in entering an order after litigation. Indeed, the Commission's use of consent decrees to infer past violations or wrong-doing breaches the Commission's own undertaking in each of the agreements referred to, for each expressly provides, consistent with Rule 2.33 of the Commission's Rules of Practice (16 C.F.R. § 2.33),

that the decree is "for settlement purposes *only* and does not constitute an admission by the proposed respondents that the law has been violated" (emphasis supplied).

Commission counsel argue here that the consent orders were considered only after a "flagrant" violation had been found in this proceeding and that a past violation was considered (Comm. br., p. 73).[10] Since Bates was exonerated of the great bulk of the charges against it in this proceeding, however, it is plain that the charge of incidental deception of children upon which the Commission now entirely relies is not in any real sense a "flagrant" violation of the Act, and the Commission, as contrasted with its lawyers, nowhere characterizes the violation in that manner.

The Commission's effort to evade the import of *NLRB* v. *Operating Engineers Local 926*, 267 F.2d 418 (5th Cir. 1959), is unfathomable. All it can say about the case is that the NLRB made a policy decision *after* that decision not to consider prior consent orders in formulating relief in subsequent cases and that policies of one agency are not binding on another. But that *policy* was not one the NLRB adopted in the exercise of administrative discretion; the *policy* adopted was to obey the law as determined by the Court of Appeals in *Operating Engineers*. That case held that the use of prior consent orders to justify a broad order in a later proceeding was improper for the very reasons use of consent orders is improper here. The holding is dispositive.

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[10] Commission counsel also argue that the consent decrees were considered "because Bates contended that one-third to one-half of its business would be destroyed if a broad order was entered against it" (Comm. br., p. 69). Bates cannot decipher the conundrum by which its contention that its business would be seriously injured by an order suggests any justification for using consent decrees as the Commission has here.

The Commission's citations to the *Grove Laboratories* and *American Home Products* cases do not support its position. Neither case purports to pass upon the propriety of using consent orders as the Commission has used them. In *American Home Products Corp.* v. *FTC*, 402 F.2d 232, 237 (6th Cir. 1968), the only reference to petitioner's prior history was:

> "The proceedings in this case dealt exclusively with representations as to efficacy of Preparation H; no other drug was involved. It was not established that petitioner is a habitual violator of the Federal Trade Commission Act, even though it is not a first offender.[11] The effect of this provision of the Commission's order is to admonish petitioner not to violate the law again. Such an order would, in practical effect, transfer the task of enforcing the Federal Trade Commission Act, as regards this petitioner, to the district courts under 15 U.S.C. § 56. This is not within the contemplation of the Act."

Similarly, the only mention of petitioner's past history in *Grove Laboratories* v. *FTC*, 418 F.2d (5th Cir. 1969), was a restatement of the Commission assertion that it could consider the fact that Grove and its parent company had been the object of six prior proceedings, four of which were litigated to final order and two of which were terminated by stipulations of discontinuance. The Court did not hold that consent orders can be considered to justify a broad order. The true significance of both opinions lies in their determinations that an order applying to "any drug" was too broad.

Nor does anything in Mr. Justice Harlan's dissent in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 399

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[11] The Commission's opinion in *American Home* had cited two prior litigated orders entered against that company. 70 F.T.C. 1524, 1625 (1966).

(1965), suggest that he was ruling on the propriety of the Commission's considering prior consent orders or that he was of the view that prior consent orders could be used to establish a "pattern of misrepresentations."

Whether the Commission would have issued the broad order that is before this Court if it had not improperly considered the prior consent orders is a question to be decided by the Commission on remand and not by its lawyers on appeal. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962); *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1033 (D.C. Cir. 1971).

Counsel urge that the broad order here could have been justified even had the Commission not considered the prior consent orders, but the fact is that the Commission did rely upon those prior consent orders to justify its order. The Commission's brief cites *Stanley Works* v. *FTC*, 469 F.2d 298 (2d Cir. 1972), and *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970), as supporting its position that consideration of prior consent decrees does not require reversal (p. 74). The dissimilarities between those two cases and the present proceeding are apparent: in both *Stanley Works* and *Tashof* the Commission had found a violation based on each of two alternative grounds, and the court affirmed after finding one of those alternative grounds sufficient to sustain the violation; here the terms of the order entered were based on a consideration of cumulative factors and only the Commission on remand can determine whether to enter the same order where not all of those factors are present.

(iv) Any order entered against Bates should include a "knew or had reason to know" clause (Reply to pp. 79-85).

The Commission does not meet Bates's contention that the order under consideration here should contain a "knew

or had reason to know" clause but argues only that *some* previous Commission orders have been entered without such a provision.

The Commission's brief pays little more than lip service to the distinction between the responsibility of an advertiser and that of an advertising agency recognized in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 382 n.8 (1965), *Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F.2d 921, 929 (6th Cir. 1968), and *Carter Products, Inc.* v. *FTC*, 323 F.2d 523, 534 (5th Cir. 1963). For example, after quoting that portion of the opinion in *Carter* that states the very concept Bates seeks to have stated expressly in any order entered here (p. 80), the Commission cites *Carter* again (p. 82) as support for its apparent contention that an advertising agency's lack of knowledge of the falsity of specific claims may be ignored in considering whether that agency will be held liable for an unknowing misrepresentation. Yet, nothing in *Carter* supports the Commission's sweeping statement that an advertising agency

> "* * * cannot make sweeping absolute claims or ambiguous claims and later assert in defense to charges of misrepresentation that it had no reason to know that the state of scientific knowledge on which these claims rested would not support them in the form in which they were made in the advertisement." (App. 226, Opinion, p. 28).

Since Bates's knowledge or lack of knowledge of any scientific fact about claims made in Wonder Bread advertising was never at issue in this case, there is nothing in the record to shed any light on what the Commission may have meant by this puzzling phrase. It at least suggests an intention to apply some other standard to advertising agencies than that recognized in the controlling cases.

This fact alone establishes the need for a "knew or had reason to know" clause in any order entered here,

and the Commission's brief concedes that it "would not object" to having this Court modify the order to provide:

> "Respondent Ted Bates and Company, Inc., shall have a defense for false advertising representations under this order where it neither knew nor had reason to know that the representations were false." (Comm. br., p. 84n. 53)

CONCLUSION

For all of the reasons stated in Bates's main brief and this reply brief and in the briefs filed by ITT Continental in which Bates has joined, it is respectfully submitted that the Commission's order should be vacated and the complaint dismissed.

Respectfully submitted,

MARSHALL COX
DONALD J. MULVIHILL
LAURENCE T. SORKIN

CAHILL GORDON & REINDEL
1819 H Street, N.W.
Washington, D.C. 20006
(202) 659-3030

Attorneys for Petitioner
Ted Bates & Company, Inc.

Of Counsel:

ELHANAN C. STONE
Ted Bates & Company, Inc.
1515 Broadway
New York, New York 10036

Dated: December 12, 1975